Petition

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NO. 81-564

In the
Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

GLEN SUTHERLAND,
Defendant-Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT A

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) In a case of first impression the Fifth Circuit permitted the disclosure of a third party's income tax return in direct violation of the Privacy Act and in conflict with standards expressed by the Supreme Court.

(2) In a case of first impression the Fifth Circuit approved the exclusion of evidence that the defendant was entitled to refunds of income taxes and affirmed his conviction for failing to file timely claims therefor.

(3) The fifth Circuit erroniously approved the inference of guilty knowledge by the defendant.

TABLE OF CONTENTS

	PAGE
Question Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Citations to Opinion Below	1
Jurisdiction	2
Statement of the Case	2
Reasons Why the Writ Should Be Granted	3
Conclusion and Prayer	9
Proof of Service	10
Appendix A — Order of the United States Court of Appeals for the Fifth Circuit, Unit A	A-1

TABLE OF AUTHORITIES

PAGE

CASES:

U.S. vs Caro, (5th Cir 1978)
569 F2d 411..... 8

Giordano vs U.S., (Sup Ct 1974)
416 U.S. 505..... 3

U.S. vs Haggins, (5th Cir 1977)
545 F2d 1009..... 8

U.S. vs Nayien, (5th Cir 1974)
504 F2d 394..... 8

U.S. vs Ponponio, (Sup Ct 1976)
429 U.S. 10..... 6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

NO.

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

GLEN SUTHERLAND,
Defendant-Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT A

The Defendant, GLEN SUTHERLAND, respectfully prays a Writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit, Unit A entered June 1, 1981, and the denial of Petition for Rehearing and Petition for Rehearing En Banc entered July 21, 1981.

CITATIONS TO OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit, Unit A, entered its opinion on June 1, 1981 and denied Petition for Rehearing En Banc on July 21, 1981.

JURISDICTION

Defendant appeals from the judgment of the United States Court of Appeals for the Fifth Circuit, Unit A entered July 21, 1981. Jurisdiction of this Court is involved under 28 U.S.C. 1954 and 2101, and Supreme Court Rule 20.

STATEMENT OF THE CASE

The defendant was convicted of failing to file timely income tax returns under Title 26 U.S.C. Section 7203. The defendant and his wife Mary Sutherland filed delinquent separate income tax returns for each year involved.

Defendant's delinquent returns revealed that he had overpaid his income taxes for each year and was entitled to refunds.

Prior to trial, Mary Sutherland moved for an order that her income tax returns not be disclosed. The motion was denied. At trial the first witness of the United States was a clerk of the Internal Revenue Service who simply identified Mary Sutherlands delinquent income tax returns which were admitted into evidence over the defendant's and Mary Sutherlands objections.

During the trial the defendant offered evidence that his returns, though delinquent, were correct with his being entitled to a refund of income tax in each year towards the point that he was being prosecuted for not filing claims for such refunds. The evidence was excluded. On appeal the panel held that the evidence was irrelevant to the determination of the defendant's criminal intent. However, the panel also held that the separate returns of Mary Sutherland were properly admitted into evidence to *rebut* the defendant's excluded evidence as to his lack of wilful

intent. Defendant's petition for rehearing en banc was denied per curiam.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

In a case of first impression the Fifth Circuit permitted the disclosure of a third party's income tax returns in direct violation of the Privacy Act and in conflict with standards expressed by the Supreme Court.

In a case of first impression before the United States Supreme Court or in any Appellate Court the income tax returns of a third party, in spite of her objection, were disclosed in this case in violation of the statutory prohibition set forth in Section 6103 of the Internal Revenue Code, the so-called "Privacy Act". In condoning the disclosure the Fifth Circuit acted in direct conflict with the Supreme Court's admonition in *Giordano vs United States* (Supreme Court 1974) 416 U.S. 505: "When Congress enacts a statute designated to limit government intrusion in the private affairs of its citizens, the statutory provisions must be followed scrupulously."

Section 6103 (h)(4)(c) provides for disclosure of a third person's income tax return in a judicial tax proceeding "if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly effects the resolution of an issue in the proceeding." There was absolutely no such predicate laid at the trial of this case. If this conviction is allowed to stand, the statutory prerequisites of a "transactional relationship" is void and third party's returns are readily available for public disclosure. The Fifth Circuit's decision would render meaningless the

standards expressed by the Supreme Court in *Giordano, supra.*

The appellate panel justified the failure of the government to first prove a "transactional relationship" between the defendant and his wife before permitting her returns to be introduced into evidence on the theory that the wife's returns were admissible to rebut the defendant's *anticipated* defense of a lack of wilfulness due to his being entitled to refunds of income taxes. An anticipated defense by the defendant can hardly serve as a statutorily required predicate of a transactional relationship between the defendant's returns and those of a third party.

The fallacy to the Fifth Circuit's theory is apparent when applied to the realities of this case. Had the wife's returns been properly excluded from evidence until a proper predicate had been laid, the defendant would have rested at the conclusion of the governments case. The defendant's returns, revealing the refunds of taxes to which he was entitled, had already been introduced into evidence. The jury could then have decided if a failure to file for refunds of taxes was a criminal act. Also, the procedure in a criminal case here approved by the Fifth Circuit effectively destroys the defendants right to a Judgement of Acquittal in a tax case when the government rests. The defendant moved for acquittal under Rule 29 of the Federal Rules of Criminal Procedure which entitles the defendant to be acquitted at the close of the government's case if the evidence is insufficient to sustain a conviction. The government's evidence depended on use of third party's returns which were admitted into evidence on the grounds of rebutting an anticipated defense which at that time had not been tendered. It was fundamental error not to grant the defendant's motion pursuant to Rule 29.

The Fifth Circuit approved the introduction of a third party's income tax return into evidence in the grounds that the evidence was admissible to rebut an anticipated defense. Yet when that defense was offered, the Fifth Circuit also approved the trial court's ruling of irrelevancy and exclusion of the evidence. That reasoning clearly vitiates the statutory requirement of evidence of a "transactional relationship" before a third party's returns are to be disclosed.

In essence the government was permitted to introduce into evidence a third party's returns without first proving a transactional relationship on the theory that the third party's returns were admissible to rebut an anticipated defense. When that defense was presented the government was successful in excluding it from evidence on the grounds of irrelevancy. That is an illogical perversion of a statute designed to protect every taxpayer and an injustice to the defendant. Congress clearly intended for the provisions of the Privacy Act to be strictly construed, imposing both criminal and civil sanctions for improper disclosure in Title 26 U.S.C. Sections 7213 and 7217. The congressional intent was thwarted in this case.

II

> In a case of first impression the Fifth Circuit approved the exclusion of evidence that the defendant was entitled to refunds of income taxes and affirmed his conviction for failing to file timely claims therefor.

The defendant was convicted of wilfully failing to file timely income tax returns under Section 7203 of the Internal Revenue Code. The evidence showed that the defendant believed and had, in fact, overpaid his income taxes so to

be due refunds. This evidence was excluded as being irrelevant based on the Fifth Circuits interpretation of the term "wilful" within the statute. The Fifth Circuit commented:

> "Sutherland's next argument on appeal is that he offered evidence of proper exemptions, credits and deductions, that he was entitled to carryovers from overpayments of taxes and that his returns were claims for refunds. All of these items might have been proof of a defense to a charge of tax evasion but were irrelevant to a charge of willful to file tax returns."

However, the Supreme Court in *United States vs Bishop* (Supreme Court 1973) 412 W.S. 346 rejected the holdings of lower courts that the misdemeanor of failing to file required a lower standard of willfulness than was necessary for tax felonies. The Fifth Circuit erred in applying different standards of wilfulness to the misdemeanor statute from that of the felony statute.

The Fifth Circuit correctly cited *U.S. vs Pomponio* (Supreme Court 1976) 429 W.S. 10 for the proposition that willfulness is "simply the intentional violation of a known legal duty." That standard is not questioned but the formulation of it to a specific set of facts cannot be generalized nor does,the standard itself serve an adequate formulation to every set of facts. In this case was there a duty to file a claim for refund and would a failure to do so be considered a crime by a jury? By condoning the exclusion of the fact that the defendant was entitled to refunds, linguistic sophistry is allowed to prevail over simple justice.

The trial court erred in excluding the evidence that the defendant was entitled to refunds each year. The Fifth Cir-

cuit perpetuated the error. Never before has the Supreme Court reviewed a conviction of a taxpayer for failing to timely claim his right to his tax refunds.

The Internal Revenue Code expressly permits the filing of a claim for refund within two years after the tax was paid *if no return has been filed.* Title 26 U.S.C. Section 6511 (a). Under the Fifth Circuit's decision the duty to file arose, as the indictment asserts, on April 15th following each calendar year, yet as a matter of statutory right the defendant could file claims for refund any time within two years thereafter. Evidence that the defendant was entitled a refund each year bore directly on his "duty" to file, regardless of the precise wording of the jury charge.

III

The Fifth Circuit erroneously approved the inference of guilty knowledge by the defendant.

The Fifth Circuit Court ruled that since the defendant knew of the requirement that he file tax returns that this includes as a matter of law that he also knew when they had to be filed.

The elements of this offense under 26 U.S.C. 7203 involves proof of failure to file on the required date and willfulness in doing so. Willfulness is "simply the intentional violation of a known legal duty." *U.S. vs Pomponio,* 29 U.S. 10, 12, (1976).

The question in the instant case is, did the Government prove that the defendant knew that he must file on the 15th of April each year? No direct evidence of this was offered.

The circumstantial evidence included the fact that the

defendant was a Municipal Court Judge and a lawyer plus the fact that the statute in the Internal Revenue Code was in the Court Houses and available to him elsewhere. No evidence was given that anyone had ever been tried for late filing of returns when he owed no taxes as in the instant case or that this law was of general knowledge to lawyers or this public.

"If the trial or Appellate Court is satisfied that the jury could not reasonably conclude that the evidence fails to exclude every reasonable hypothesis but that of guilt then the trial court, or on appeal, this Court must hold that "the jury must necessarily have a reasonable doubt as to the inconsisting." *U.S. vs Caro* (5th Cir. 1978) 569 F2d 411, 416, *U.S. vs Haggins* 545 F2d 1009, 1012 (5th Cir. 1977) quoting *U.S. vs Nayien*, 504 F2d 394, 395 (5th Cir. 1974) Cert. denied 420 W.S. 964.

The question of "inferring guilty knowledge" discussed in *U.S. vs Haggins* Supra 1013 concerning passing of counterfeit money. The Fifth Circuit required evidence of knowledge in that case.

In the instant case the Fifth Circuit assumed the defendant knew the law on tax filing deadlines under all circumstances. We ask this Honorable Court to determine whether a lawyer is presumed to know the income tax law under these circumstances or whether the Government must prove he knew it by direct or substantial circumstantial evidence.

Unless the defendant is presumed to know the law under these circumstances then this case is in conflict with all the other 5th Circuit cases on circumstantial evidence and the ruling in *Pomponio, Supra*, that the government prove that Appellate violated a known legal duty to establish *Willfulness*.

CONCLUSION AND PRAYER

Each of the questions presented herein have nation-wide importance to taxpayers and to the Internal Revenue Service and Department of Justice in administrating the income tax laws. Therefore the defendant prays that this Court grant a Petition of Certiorari to the United States Ccourt of Appeals for the Fifth Circuit, Unit A.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned attorney of record for defendant GLEN SUTHERLAND, hereby certifies as follows:

(A) That I, Towner Leeper, am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown:

(B) That the names and addresses of the attorneys of records for the adverse party are as follows:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

The Honorable William French Smith
Attorney General
Department of Justice
Washington, D.C. 20530

LeRoy Morgan Jahn
Assistant United States Attorney
United States Courthouse
655 E. Durazno Blvd., Suite G-13
San Antonio, Texas 78206

(C) That on this day I serve three printed copies of the foregoing Petition for Writ of Certiorari on the said William French Smith, the said Wade H. McCall, Jr., LeRoy Morgan Jahn, attorneys for said Appellee, by depositing same in Emory Air Express, with prepaid express service, property addressed to said attorneys for Appellee at their said addresses.

EXECUTED, this 14th day of September, 1981.

Towner Leeper
Attorney for Defendant
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(915) 533-6856

SWORN TO AND SUBSCRIBED BEFORE ME by the said TOWNER LEEPER, Attorney for Defendant, this 14th day of September, 1981.

Lee Burkholder
Notary Public In and For
El Paso County, Texas

My Commission Expires:

June 30, 1984

"APPENDIX A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 80-1675

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GLEN SUTHERLAND,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion June 1, 1981, 5 Cir., 198 , F.2d).
July 21, 1981

Before REAVLEY, RANDALL and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

CAROLYN D. RANDALL
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

NO. 80-1675

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GLEN SUTHERLAND,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

June 1, 1981

Before REAVLEY, RANDALL and SAM JOHNSON, Circuit Judges.

PER CURIAM:

Appellant Glen Sutherland appeals from a conviction for willful failure to file an income tax return for each of the years 1975, 1976 and 1977 in violation of 26 U.S.C. §7203 (1976). Finding no error, we affirm.

In 1975, 1976 and 1977, Sutherland received income

from the City of El Paso, Texas, and from his private law practice. During those years, his wife received income from the Ysleta Independent School District and from annuity payments. Mr. and Mrs. Sutherland had a combined community gross income of $32,634.39 for 1975; $31,766.09 in 1976 and $28,305.10 for 1977.

Sutherland failed to file his tax returns for the years in question until August 8, 1979. Mrs. Sutherland's separate tax returns for 1975 and 1976 were similarly late, being filed on August 23, 1979. Neither Mr. Sutherland nor Mrs. Sutherland sought an extension of time in which to file the returns. Sutherland admitted to the Internal Revenue Service agent who investigated his returns that the returns had not been timely filed, although he knew of the requirement that he file a tax return.

Sutherland's first contention on appeal is that the use of his wife's income tax return violated her rights under 26 U.S.C. §6103 (a) and prejudiced his defense. Section 6103 (a) prohibits the disclosure of tax returns except as otherwise provided. One of these exceptions is 26 U.S.C. §6103 (h)(4)(c), which provides for disclosure in judicial tax proceedings "if such return, or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly effects the resolution of an issue in the proceeding." In this case, Mrs. Sutherland's tax returns were introduced to rebut Sutherland's claim of a lack of willfulness in his failure to file timely tax returns. Although Mr. and Mrs. Sutherland filed separate returns, withholding exemptions attributable to their children and credits from Mrs. Sutherland's income were attributed to Mr. Sutherland's separate returns. Mrs. Sutherland's separate returns also show that her tax liability was much greater than Sutherland's because of benefits of the com-

munity attributed only to his tax returns. Since Mrs. Sutherland's returns were directly related to Sutherland's returns, disclosure in a judicial proceeding was clearly authorized by the statute.

Sutherland's next argument on appeal is that he offered evidence of proper exemptions, credits and deductions, that he was entitled to carryovers from overpayments of taxes and that his returns were claims for refunds. All of these items might have been proof of a defense to a charge of tax evasion but were irrelevant to a charge of willful failure to file tax returns. The elements of an offense under 26 U.S.C. §7203 involve proof of failure to file and willfulness in doing so. *United States v. Buckley*, 586 F.2d 498, 503-04 (5th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). Willfulness is "simply the 'intentional violation of a known legal duty.'" *Id.*, citing *U.S. v. Pomponio*, 429 U.S. 10, 12 (1976). In this case, it was established that Sutherland had a duty to file and still failed to file on time. His claim defenses did not help prove the absence of willfulness. The evidence was properly excluded.

Sutherland's next point on appeal is that he should have been allowed jury instructions requiring an evil motive in his failure to file. It is clear, however, that proof of evil motive or bad purpose is not required to show willfulness. *U.S. v. Schafer*, 580 F.2d 774, 781 (5th Cir.), *cert. denied*, 439 U.S. 970 (1978).

Appellant next argues that he should have been entitled to an instruction to the effect that if he felt that he did not have to file a timely income tax return if no income tax was owed in addition to the income tax withheld from his salary, he could not be found guilty of willfully failing to file a timely return. The instruction that was given by the court clearly covered the same material and the failure of the court to instruct in the language proposed by

Sutherland was not error. Lastly, Sutherland complains of the failure to give his requested instruction concerning interpretations of the Internal Revenue Code of 1954, as amended, which would have shown that no tax was due and owing for the years in which he failed to file his return. However, a tax due and owing is clearly not an essential element of the offense, *U.S. v. Walker,* 479 F.2d 407 (9th Cir. 1973) and the instruction which was given was proper.

Sutherland's final argument on appeal is that he was entitled to argue to the jury that it could not make a finding of willfulness if it found no bad purpose and evil intent in his failure to file. As stated above, the Supreme Court said in *Pomponio* that willfulness is simply a voluntary, intentional violation of a known legal duty. The trial court correctly refused to allow Sutherland to argue the law incorrectly.

AFFIRMED.